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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
PETITIONER,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,
RESPONDENTS,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO

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BRIEF OF AMICUS CURIAE STATE OF OHIO

INTEREST OF STATE OF OHIO

The laws of the State of Ohio prohibit discrimination on the basis of sex in employment. *Ohio Revised Code* § 4112.02 (A). Pursuant to this statute, the State is currently litigating several cases which may be affected by the decision in this case. For this reason, the State of Ohio, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 511 F.2d 199, *Wetzel, et al.* v. *Liberty Mutual Insurance Company.*

The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F.Supp. 1146 (1974). The memorandum order of that court denying petitioner's Motion for Reconsideration is reported at 372 F.Supp. 1163 (1974).

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Third Circuit affirming the judgment of the District Court of the Western District of Pennsylvania was entered on February 11, 1975. The petition for writ of certiorari was filed on April 2, 1975 and granted on May 27, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 703 (a) (1) of Title VII of the Civil Rights Act of 1964, Act of July 2, 1964, 78 Stat. 253, 42 U.S.C. § 2000e-2 (a) (1).

QUESTION PRESENTED

Whether the adoption of a disability income protection plan which admittedly treats women different than men by excluding coverage of disabilities due to pregnancy is sex discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (a) (1).

STATEMENT OF FACTS

Liberty Mutual is a casualty insurance company which maintains offices throughout the country. The Company provides its employees with an extensive contributory group disability income protection plan. Subscription to this plan is mandatory for all employees and provides benefits to an employee who is absent from work for eight calendar days due to a covered disability or illness which requires the treatment of a physician.

Pregnancy-related disabilities are the only medically verifiable disabilities other than those resulting from acts of war or intentionally self-inflicted injuries which are excluded. In addition, leaves or temporary absences due to pregnancy are not covered by the plan.

Other Company policies relating to pregnancy have varied somewhat since July 2, 1965, the effective date of Title VII, but such policies have never complied with the law until the trial court's decision at 372 F.Supp. 1146 (W.D. Pa. 1974). Thus, from 1948 until March, 1967, the Company's maternity leave policy was unchanged. During that time, a pregnant employee was not permitted to work beyond her sixth month of pregnancy under any circumstances and was discharged by the Company at that time. In March, 1967, the Company modified its leave policy slightly so that a pregnant employee was discharged after her eighth month of pregnancy. The policy of automatic termination continued until September, 1970, when the Company began to grant unpaid leaves of absence as an alternative to discharge. Employees were required to take leaves of absence after the eighth month of pregnancy and to return to work no later than six months from commencement of the leave or three months from the date of delivery, whichever came first. The policy was modified in November, 1971, to enable an employee to

work for as long as her physician verified her ability to continue. The same mandatory return dates, which were uniformly applied without regard to any disabling complications which may have resulted from pregnancy or childbirth, remained in force. Thus, an employee granted a leave of absence for maternity was required to return to work on a date certain or be terminated from employment. There was no such requirement for any other disability.

The Third Circuit at 511 F.2d 199, 208 found such mandatory return dates, applied only to disability due to pregnancy, to be sex discrimination in violation of Title VII. This finding is not in issue before this Court.

Further, the Company's health insurance plan provides coverage for children of employees who are working for the Company at the time of the birth of the child, and this excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child. Under such a policy, natural born children of women employees would not be covered by the Company's health insurance plan, whereas natural born children of male employees would be covered under the plan.

On another level, Liberty Mutual used, until very recently, different standards for female, as opposed to male employees, in relation to recruitment, hiring, promotion and salaries. Such disparate treatment occurred due to the fact that in the Claims Department[1], an employee's original assignment determined, in effect, the employee's future chances of promotion.

Promotion to the higher rank of Claims Supervisor was limited to persons holding the position of Claims Adjuster

[1] Claims Department promotions, *etc.* are the only ones in issue here.

and until 1970, that position was limited to male employees. On the other hand, the entry level classification in the Company's Claims Department of "Claims Representative" was exclusively limited to women until 1970. There was no avenue of promotion to Claims Supervisor and higher supervisory positions for those persons classified as "Claims Representatives" on entry into the Company in its Claims Division.

There were two higher supervisory positions in the "Claims Representative" category, that of "Supervising Claims Representative" and "Claims Representative Supervisor", but no promotion beyond the second rank. Although the line of responsibility from "Claims Representative Supervisor" runs to "Claims Supervisor" there was no similar line of promotion because all "Claims Supervisors" were drawn from the ranks of "Claims Adjuster". The only educational requirement necessary in order to be hired as a "Claims Adjuster" or a "Claims Representative" was a college degree. No prior experience in the insurance business was required and, in fact, the Company did not hire persons who had worked for other companies in its entry level positions in the Claims Department.

The recruiting brochures for the position of "Claims Representative" were entirely female oriented.[2] However, the recruiting brochure used by the Company until 1970 described the position and duties of "Claims Adjusters" in an entirely male-oriented fashion. Its illustrations showed men performing the duties of the position, and bearing the legend in large type, "Are you the right man?", and recited the avenues of advancement from Claims Adjuster through the Branch Office, Claims Manager, Division

[2] Its title page carried the caption and picture identifying the position as a job fit for a queen.. It showed women in its illustrations of persons performing their duties in this capacity.

Claims Manager and so on up the ladder. Between July 1, 1965[3] and the end of 1966, 401 persons were hired for the positions of "Claims Representative", not one of which was male. Between July 1, 1965 and March 17, 1972, 2,329 persons were hired as "Claims Representatives" of which 2,302 or 98.84% were women. The first male "Claims Representative" was hired in 1969, four in 1970, and twenty in 1971. During the period from 1965 until the end of 1970, the Company hired over 2,000 "Claims Adjusters", not one of which was female.

As a result, the pay differential between the positions of "Claims Adjuster" and "Claims Representative" was substantial, being approximately $2,500 per year.

The district court noted that the Company offered no evidence of any bona fide occupational qualification to justify the complete exclusion of women from the Claims Adjuster position for over a period of five years. It held that the Company deliberately engaged in sex discrimination in hiring, promotion, salaries, and recruitment. 372 F.Supp. at 1154.

SUMMARY OF ARGUMENT

Liberty Mutual has pursued, for some time, a deliberate policy of sex discrimination in its Claims Department. Such discrimination has not only permeated its policies relating to pregnancy, but has also affected its hiring, assignment and promotion policies. Based upon these findings by the lower court, the past policies of the Company affecting women approach the brink of mere pretexts of invidious discrimination on the basis of sex.

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[3] When the position of Claims Representative was first created.

The disability income plan adopted by the Company excludes from coverage disabilities related to pregnancy. Such a policy violates Title VII in two ways:

1. Dissimilar treatment for men and women who are similarly situated has been held unlawful under Title VII in a variety of contexts in addition to pregnancy disability benefits; and

2. While it is true that all women workers are not pregnant at any given time, women in the labor force are susceptible to becoming pregnant. It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

Where a policy is demonstrated to have discriminatory effects, it can only be justified by reasons of a business necessity to negate the illegal effect. Because the petitioner did not adduce any evidence to justify the policy as a business necessity, the application of this rule is unnecessary in this case.

Finally, it is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by petitioners on *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello*.

Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination, petitioner's exclusion of pregnancy disabilities from its disability insurance program even

though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

The Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

ARGUMENT

I. LIBERTY MUTUAL'S FAILURE TO COVER DISABILITY DUE TO PREGNANCY IS UNLAWFUL SEX DISCRIMINATION IN VIOLATION OF TITLE VII.

The decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) makes it clear that, under Title VII, "what is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. Providing a male employee disabled from heart disease or prostate surgery, with insurance benefits, but denying a female employee, disabled from pregnancy, those same benefits is certainly arbitrary. It is also unlawful due to the disparate effect which such a policy has on women employees.

Dissimilar treatment for men and women who are similarly situated has been held unlawful under Title VII in

a variety of contexts in addition to pregnancy disability benefits. *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971) (held that company could not exclude women with pre-school age children from employment opportunities unless they also exclude men with pre-school age children); *Sprogis* v. *United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (held that it was illegal to apply "no marriage" rule solely to stewardesses and not to male employees and that this regulation could not be justified as a BFOQ because of customer preference); *Bartmess* v. *Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971) (discrimination with regard to "fringe benefits" such as retirement plans which set different compulsory ages for retirement for men and women are prohibited by Title VII); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) (held that refusal to consider or hire women for jobs as switchmen was unlawful). *See also Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

Under either the "adverse impact" or the "disparate effect" test, Liberty Mutual's policy of excluding disability due to pregnancy from its wage continuation plan is sex discrimination.

Initially, a consideration of the background in which this case arises is necessary in order to fully understand the policy at issue. The past policies of the Company affecting women approach the brink of mere pretexts of invidious discrimination on the basis of sex. As the District Court found, Liberty Mutual has pursued for some time, a deliberate policy of sex discrimination throughout its Claims Department. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. 1146, 1154 (W.D. Pa. 1974). Thus, men were hired into the Department as "Claims Adjusters" with opportunities to reach the highest level of management. In contrast, women, until 1972, made up 98.84%

of those hired as "Claims Representatives", who, by definition, were unable to rise higher than two ranks beyond the level of their initial assignment in the Department. Until 1970, no woman in the Claims Department advanced beyond those specified ranks. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. at 1154. Discrimination in hiring, therefore led, in turn, to sex discrimination in the area of salaries and promotions.

Liberty Mutual offered no evidence at the trial court level of any bona fide occupational qualification to justify the complete exclusion of women from the position of "Claims Adjuster" through which promotions were possible. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. at 1154. Further, Liberty Mutual is not contesting the lower court's determination that it practiced discrimination on the basis of sex in the areas of recruitment, hiring, salaries and promotions. Rather, the Company's appeal is limited to the issue of whether failure to cover disability due to pregnancy is violative of Title VII.

In regard to pregnancy, which uniquely affects women, Liberty Mutual has, as in its other employment practices, acted in a discriminatory fashion. Until March, 1967, the Company's policy was to terminate the employment of a pregnant employee at the end of her sixth month of pregnancy. Thereafter, until September, 1970, the policy was to terminate an employee after the eighth month of pregnancy. An employee so terminated could be re-employed, at the sole discretion of the Company, if she re-applied for employment after the birth of her child and if there was a position available. In September, 1970, Company policy was again changed to require pregnant employees either to terminate employment or take a leave of absence at the end of the eighth month and return to work by a certain date. Subsequently, this policy was made more

flexible as to date of the commencement of leave, however, arbitrary limits on date of return to work were still enforced. Similar return dates were not applied to disabled males. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F. Supp. at 1155, 1159.

In addition, petitioner's health insurance plan, while providing coverage for children of employees who are working for the Company at the time of the birth of the child, excludes from coverage the child of an employee who is absent on a maternity leave of absence at the time of the birth of the child. *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F.Supp. at 1155. It is stating the obvious to note that no natural born children of women employees would ever be covered under the policy.

The described history of disparate treatment toward women and pregnancy which Liberty Mutual has implemented clearly illustrates a long-standing and pervasive discrimination against women. The policy at issue is simply a part of the Company's other discriminatory practices because it treats female employees in a manner different from male employees.

Further, Liberty Mutual's wage continuation plan protects male employees from the financial strain occasioned by virtually all planned or unplanned physical disabilities which they are likely to encounter. In contrast, female employees who are uniquely susceptible to disability due to pregnancy are not covered by the plan during their period of physical disability. Therefore, the impact of the plan is adverse to women employees and discriminates on the basis of sex.

While it is true that all women workers are not pregnant at any given time, women in the labor force are sus-

ceptible to becoming pregnant.[4] It is not necessary that all women be adversely affected by the policy in issue; it is only necessary that women are affected by the policy at a differential rate than men in order to trigger Title VII review.

A similar situation was presented to this Court when it considered the so-called "grandfather clauses" which exempted from the required literacy test for voting, all persons entitled to vote on a given date, prior to ratification of the Fifteenth Amendment or those whose ancestors were then entitled to vote. While all black persons were not disenfranchised by these clauses, a significant, though by no means *absolute,* number of blacks were harmed, although the policy was neutral on its face. However, a differential rate of black persons were, like the women employees in the instant case, susceptible to being harmed by it. Thus, this Court, finding that no purpose was served by the "grandfather clauses" other than to evade the commands of the Fifteenth Amendment declared "grandfather clauses" invalid. *Guinn* v. *United States,* 238 U.S. 347 (1915). *See also Myers* v. *Anderson,* 238 U.S. 368 (1915).

Under Title VII, as in the "grandfather clause" cases, courts have not required that all members of a class be discriminated against to render a practice unlawful. What is required is that the policy affects a disproportionate number of members of such class. Thus unlawful discrimination in employment was found under Title VII on the basis of excessive garnishment, *Johnson* v. *Pike Corporation of America,* 332 F.Supp. 490 (D.C. Calif. 1971), parenthood of illegitimate children, *Davis* v. *American National Bank of Terrell, Texas,* Civ. Case No. CA3-4512 (N.D. Tex. — F.Supp. —, 1971) and relationship to current employees or union members; *United States* v. *Sheet Metal Workers International Assoc., Local No. 36 and IBEW Local No. 1, AFL-CIO,* 416 F.2d 123 (8th Cir. 1969).

[4] In recent years the most rapid gains in labor force participation rates of women have occurred among wives under age 35, and especially among those with children under six. In fact, among wives with children under three, the latest over-the-year increase was 2½ percentage points, a change matched only once since 1960. Waldman & Whitmore, *Children of Working Mothers, March 1973,* 97 Monthly Labor Rev. 50, 52 (May, 1974). Since 1940, the proportion of working women who are married has increased from 30 to 60 percent. Waldman & McEaddy, *Where Women Work — An Analysis by Industry and Occupation,* 97 Monthly Labor Rev. 3 (1974).

Finally, the exclusion of pregnancy disability under the wage continuation plan at issue undermines the spirit and letter of Title VII. As Congress has indicated in its most recent consideration of equal employment opportunity, "discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." House Report on Equal Employment Opportunity Enforcement Act of 1972, 2 U.S. Code Cong. and Admin. News 2140 (92nd Cong., 2nd Sess. 1972).

Further, the guidelines promulgated by the Equal Employment Opportunity Commission support this view. 29 C.F.R. § 1604.10 (b) provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extension, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or tem-

> porary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The Court below accorded deference to the EEOC guidelines in reaching its decision and found them to be consistent with Congressional intent, unlike the guidelines considered in this Court's opinion in *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). The guidelines should be given deference because it is the Equal Employment Opportunity Commission which is charged with the enforcement of the statute. *Griggs* v. *Duke Power Co., supra*; *Phillips* v. *Martin-Marietta Corp., supra*; and *Satty* v. *Nashville Gas Company*, No. 75-1083 (6th Cir., Aug. 8, 1975).

It is apparent that Liberty Mutual has offended the policy and requirements of Title VII by treating male employees in a manner different from female employees and by excluding disability due to pregnancy from its wage continuation plan, which exclusion has an adverse impact on women workers who are susceptible to becoming pregnant. For these reasons, the policy in issue is sex discrimination in violation of Title VII.

II. LIBERTY MUTUAL HAS NOT OVERCOME THE SEXUAL IMPACT OF ITS POLICY BY REASONS OF BUSINESS NECESSITY.

If an employer implements a policy or practice which has an adverse impact upon a protected class of employees, this fact in itself does not render the policy or practice illegal under Title VII.[5] However, upon a showing of an

[5] However, should this Court find that the policy at issue herein is outright disparate treatment based on sex, the business necessity test would not apply and the policy would violate Title VII, to which there is no defense.

adverse impact on a protected class of employees, the burden shifts to the employer to justify its policy or practice by reasons of a business necessity to negate the illegal policy or practice. *Griggs* v. *Duke Power Co., supra*; *Robinson* v. *Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC* v. *United States*, 416 F.2d 980 (5th Cir. 1969). But *see also Jones* v. *Lee-Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970) where the court held that "when a policy is demonstrated to have discriminatory effects, it can be justified only by showing that it is necessary to the safe and efficient operation of the business", 431 F.2d at 249.

The business necessity test was mandated by Congressional intent as a reasonable standard to maintain employer's policies and practices which discriminate against a protected class of employees but are absolutely necessary to continue the operation of the business. *Robinson* v. *Lorillard Corp., supra.* If business necessity cannot be shown, the policy or practice must fall. In *Griggs*, this Court succintly stated the rule:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. 401 U.S. at 424.

Because the petitioner did *not* adduce any evidence to justify the policy as a business necessity under this Court's guidelines in *Griggs, supra*, the application of this rule to this case is unnecessary, and solely mechanical. As the Court of Appeals for the Third Circuit found: "There are a number of cases that consider the business necessity

defense, but Liberty Mutual has not cited any of them in relation to its justification argument." *Wetzel* v. *Liberty Mutual Ins. Co.*, 511 F.2d 199 at 208 (3d Cir. 1975). Also the District Court when considering the Company's Motion for Reconsideration, noted that the Company did not set forth any evidence in support of its argument. 372 F.Supp. at 1164. The Company stated that it could not present any statistical evidence because none were available. 372 F.Supp. at 1164. The Company also suggested to the court that ". . . it can be assumed that females on pregnancy leave of absence will remain at home longer than normal." As the court found again, no evidence was presented to support this argument. It is an anomaly that the Company would implement its policy of non-coverage of pregnancy-related disabilities under its plan without the benefit of an empirical study to determine, *in fact*, that coverage of such disabilities is *beyond* business realities and practicalities. This policy is seemingly consistent, however, with the Company's prior policies with regard to treatment of women in other terms and conditions of employment. Certainly a major employer like Liberty Mutual does not make such fiscal decisions without completely understanding the ramifications of its employment practices. Rather, the Company has arbitrarily found that women who become pregnant *must* not be covered by the plan.

The petitioner claims in brief that exorbitant costs will result if the pregnancy related disabilities are covered under the plan. Assuming *arguendo* that this is the case, since there is no evidence in this record supporting such claims, the question remains whether the plan can be altered to meet the Title VII proscriptions without an increase in costs. In *Robinson* v. *Lorillard, supra,* the Court of Appeals for the Fourth Circuit found that the employer who has a practice which has an adverse impact upon a protected

class of employees must explore alternatives to determine whether there exists an acceptable alternative which accomplishes the business purpose advanced and which has a lesser impact. The Court stated:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

In this case, the Company's business purpose is to adopt a plan which provides disability benefits to its employees. That plan may change from time to time due to the economy, laws, internal employment policies, and other forces. If the court finds that Liberty Mutual's policy of excluding pregnancy-related disabilities violates Title VII, the Company will amend the policy to either account for or offset any increased costs resulting from complying with the law.[6] Of course, that is speculative on the basis of this record;[7] however, suffice it to say that there was no legal requirement placed upon Liberty Mutual to adopt the

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[6] For example, the State of Ohio has adopted a state employee disability income protection plan which provides a maximum of three years benefits to all employees and covers pregnancy related disabilities. In addition, dollar costs alone have not been determinative in determining the existence of business necessity. *Robinson* v. *Lorillard, supra*; *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971); *Johnson* v. *Pike Corp. of America*, 332 F.Supp. 490 (C.D. Calif. 1971).

[7] Obstetricians generally agree that the period of physical disability ranges between ten days and three weeks after delivery. Note, Love's

plan which it did; that decision will remain Liberty Mutual's. But, the plan finally implemented must meet the legal requirements of Title VII.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROHIBITS ALL SEX DISCRIMINATION IN CONDITIONS OF EMPLOYMENT AND MAKES UNLAWFUL SEX DISCRIMINATION WHICH MAY NOT BE UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

It is essential in this case to keep the issue in focus: the question is not whether the Equal Protection Clause of the Fourteenth Amendment requires inclusion of disabilities relating to pregnancy within a disability insurance program, but whether Title VII of the Civil Rights Act of 1964 requires such inclusion. Reliance by petitioners on *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) is misplaced because the case at bar concerns statutory interpretation rather than constitutional analysis found in *Aiello.*

Labors Lost: New Conceptions of Maternity Leaves, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260, 262, n. 11 (1972). Other obstetricians take a more conservative view: while most women are no longer disabled by the third week following delivery, their physiology does not completely return to normal until five or six weeks after delivery. *Id.* at 287, n. 145. Surely, if employers acted to enforce these medically-ascertainable facts, the cost increase predicted as necessary to cover pregnancy as a disability would be substantially abated.

More importantly, the statistics presented by *amici* are not relevant to the determination of this matter. They reflect neither the business practices which were applicable when the statistics were determined nor the effect which various other aspects of sex discrimination have had distorting the results.

Implicit in petitioner's reliance on *Aiello, supra,* is the premise that Congress, in legislating against discrimination, cannot make *unlawful* as sex discrimination that which is not *unconstitutional* as sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Aside from the significant factual distinctions between this case and *Aiello,* it is clear that petitioner's premise is unfounded. Congress can remedy problems as they perceive them and make unlawful, actions which are, nonetheless, constitutional.

Petitioner's argument:

> . . . presupposes that the lawful scope of employment policies under the former Act [Title VII] is coextensive with the latter constitutional provision [Fourteenth Amendment]. We believe that the better approach permits Title VII under the Commerce Clause to extend beyond the reach of the Equal Protection Clause. *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294. Otherwise, Title VII's effective reach would be limited by the decisions of the Supreme Court, a result effectively curtailing its implementation. *Satty* v. *Nashville Gas Co., supra,* at 8. (Slip opinion.)

In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), the Attorney General of the State of New York argued that the Voting Rights Act of 1965 "could not be sustained as appropriate legislation to enforce the equal protection clause unless the judiciary decides that the state action prohibited by the act of Congress is forbidden by the equal protection clause itself. This Court disagreed with the New York State Attorney General stating at page 653 that:

> . . . it was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.

Thus, the Voting Rights Act of 1965 made certain actions on the part of the State of New York unlawful, even though such actions were not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Similarly, herein, Title VII of the Civil Rights Act of 1964 makes unlawful as sex discrimination petitioner's exclusion of pregnancy disabilities from its disability insurance program even though a similar insurance program of a government body might not be violative of the Equal Protection Clause of the Fourteenth Amendment.

In a related vein, even though there may be no constitutional duty to act under the Fourteenth Amendment to undo *de facto* school segregation, because such discrimination may not be unconstitutional, state legislatures can pass legislation making it unlawful and school boards can take action to eliminate such segregation. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 16 (1971); *Offermann* v. *Nitkowski,* 378 F.2d 22 (1967); *Porcelli* v. *Titus,* 431 F.2d 1254 (3d Cir. 1970); *Tometz* v. *Board of Education,* 39 Ill. 2d 593, 237 N.E.2d 498 (1968); *Addabbo* v. *Donovan,* 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E. 2d 112 (1965), *cert. denied,* 382 U.S. 905 (1965).

The lesson of these cases is that the Constitution does not set outside limits on what discriminatory acts may be made unlawful. Rather, it sets lower limits on what discriminatory acts are unconstitutional and cannot be made lawful. Thus, while Congress cannot make lawful those actions

forbidden by the Fourteenth Amendment, Congress can make unlawful, actions which are not violative of the Fourteenth Amendment itself.

Comparing the difference between statutory interpretation and constitutional analysis, the court in *Gilbert* v. *General Electric Co.,* 10 F.E.P. Cases 1201, 1205 (4th Cir. June 27, 1975) stated:

> There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection Clause as in *Aiello* and in the statutory construction of the "sex-blind" mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be "rationally supportable" and that was the situation in Aiello, as well as in Reed and Frontiero. The test in those cases was legislative reasonableness. Title VII, however, authorizes no such "rationality" tests in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. (Emphasis in original.)

All of the Circuit Courts of Appeal which have considered this question, and the majority of the District Courts as well, have recognized the difference between applying constitutional standards on the one hand, and statutory construction on the other, and such courts have held that *Aiello, supra,* is not dispositive of a claim for pregnancy disability benefits under Title VII. *Satty* v. *Nashville Gas Company, supra*; *Wetzel* v. *Liberty Mutual Ins. Co., supra*; *Communications Workers* v. *American T. & T. Co.,* 513 F.2d 1024 (2d Cir. 1975); *Gilbert* v. *General Electric Company,* 10 F.E.P. Cases 1201 (4th Cir. June 27, 1975). *See also Holthaus* v. *Compton & Sons,* — F.2d —, 10 F.E.P. Cases 601 (8th Cir. 1975); *Zichy* v. *City of Philadelphia,* — F.Supp. —, 10 F.E.P. Cases 853 (E.D. Pa.

1975) ; *Sale* v. *Board of Education,* 390 F.Supp. 784 (N.D. Iowa 1975) ; *Vineyard* v. *Hollister Elementary School District,* 64 F.R.D. 580 (N.D. Cal. 1974) .

Even though *Aiello* is not applicable to Title VII litigation, that question need not be decided in this case because the facts are so different in the case at bar as to render *Aiello* inapposite. Initially, in *Aiello,* there was no claim or holding that the exclusion of pregnancy disability benefits from the coverage of the plan in question was related to a pattern of sex discrimination. In the case at bar, however, petitioners were found to have engaged in a pervasive pattern of sex discrimination which encompassed disparate treatment of male and female employees in regard to salaries, promotions, recruitment, and hiring practices.

Further, disability due to abnormal pregnancy was covered by the compensation plan considered in *Aiello* as of January 1, 1974. *See Aiello, supra,* at 490-491, note 15. Only normal pregnancy and delivery disabilities were excluded from the benefits. In contrast, Liberty Mutual has excluded all pregnancy-related disabilities. As the Third Circuit noted in its opinion, "at oral argument, appellant's counsel declared that the company's income protection plan would not cover a disability suffered by a pregnant woman but would have covered the disability had the woman not been pregnant." *Wetzel* v. *Liberty Mutual Insurance Co., supra,* at 203.

Petitioner and *amici* supporting petitioner contend that affirming the decision of the Court of Appeals below would impose a different standard upon private, as opposed to public, employers. Such a conclusion is erroneous. Initially, *Aiello* concerned requirements imposed by the Equal Protection Clause of the Fourteenth Amendment, not those imposed by Title VII. Further, Title VII, as amended by Congress in 1972, applies to state and local

governments as well as to private employers. The prohibitions and requirements of the act, whatever they are determined to be, will be equally applicable to the public and private sectors.

CONCLUSION

The State of Ohio respectfully requests the Court to affirm the lower court's decision on the basis of the record in this case and the legal arguments presented herein. Should the Court decide that the record is incomplete on the question of whether a business justification exists to support the policy at issue, the Court may wish to remand the case to the trial court to adduce further evidence on this question, should any exist. However, if this approach is taken, this Court should articulate the standards establishing what constitutes business necessity under the facts of this case.

Respectfully submitted,

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